STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2014
v	Nos. 314343 and 314362 Chippewa Circuit Court
DARYL DUANNE EVANS, Defendant-Appellant.	LC Nos. 12-000843-FH 12-000811-FH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

In these consolidated appeals, defendant, Daryl Duanne Evans, appeals as of right from his convictions following a jury trial of delivery of a schedule 2 controlled substance less than 50 grams (Oxycodone) (3 counts), MCL 333.7401(2)(a)(*iv*), delivery of a schedule 3 controlled substance (Vicodin), MCL 333.7401(2)(b)(*ii*), and delivery of a schedule 4 controlled substance (Xanax or Alprazolam), MCL 333.7401(2)(c). The trial court sentenced defendant as a repeat drug offender, MCL 333.7413(2), to serve 44 months' to 20 years' imprisonment for his each of his convictions of delivering schedule 2 and schedule 3 controlled substances, and 44 months' to 15 years' imprisonment for his conviction of delivering a schedule 4 controlled substance, with the sentences to be served concurrently. We affirm defendant's convictions but remand to the trial court for the ministerial task of amending the presentence investigation report (PSIR).

I. BASIC FACTS

This case arises from a series of controlled drug purchases supervised by the Straits Area Narcotics Enforcement (SANE) team. A police officer testified that, using recording devices and prerecorded money, he supervised four controlled purchases between defendant and the two confidential informants. The first transaction occurred on January 6, 2011. The confidential informant involved testified that he purchased Xanax and Oxycontin from defendant and then turned the drugs over to SANE. A laboratory analysis confirmed that the drugs were, in fact, Xanax and Oxycontin. The second, third, and fourth controlled buys occurred in April 2011. The confidential informant involved in those transactions testified that on April 5, 2011, she purchased Oxycontin from defendant. On April 6, 2011, she purchased Vicodin from defendant. And on April 7, 2011, she purchased Oxycontin from defendant. The informant testified that after each transaction, she turned the drugs over to SANE. The drugs were confirmed by laboratory results to be Oxycontin and Vicodin. The police officer corroborated the informants'

testimony, including the fact that he searched the informants before and after each drug transaction.

II. COLLATERAL EVIDENCE

On appeal, defendant first argues that he was denied a fair trial by the testimony of a SANE police officer insinuating or injecting into evidence other acts by defendant. Defendant also argues that his trial counsel was ineffective in failing to object or move for a mistrial.

At trial, the prosecutor asked the SANE officer on direct examination whether he knew defendant, and the officer confirmed that he did. When the prosecutor asked the officer how he knew defendant, the officer explained: "through my investigations on the narcotic team. And also other situations. I have dealt with him in domestics as a patrolman before I was on the narcotics team." Defendant contends that the officer's references to collateral drug and domestic matters were irrelevant, inadmissible, and prejudicial.

With regard to the officer's references to defendant's prior drug involvement, we agree with the prosecution that defendant waived any error by inviting such testimony in his opening statement. In his opening statement, defense counsel argued that in a game similar to musical chairs, drug informants target others to "pass their bad luck along" to in order to mitigate or escape their own legal troubles, and intoned that the informants here framed defendant, in part because of his "known drug and alcohol problem." Furthermore, during cross-examination of the SANE officer, defense counsel solicited testimony that defendant was known to have drug and alcohol problems. A defendant may waive appellate review of a decision to admit other acts evidence by voluntarily offering the information. See, e.g., *People v Horn*, 279 Mich App 31, 35-36; 755 NW2d 212 (2008). Because defendant opened the door to testimony about his known drug use, any challenge on appeal pertaining to the officer's brief reference or insinuation about it has been waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

That leaves the officer's testimony regarding "domestics." Because defendant did not object at trial, this issue is unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review unpreserved evidentiary claims for plain error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *Id*. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Moreover, reversal is only warranted when the plain error resulted in the conviction of an actually innocent defendant or when the error seriously affected the "fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *People v Loper*, 299 Mich App 451, 457; 830 NW2d 836 (2013).

We agree with defendant that the officer's reference to defendant's involvement in "domestics" was inadmissible. For evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b): (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). The prosecution solicited the

complained of testimony while trying to establish how the SANE officer knew defendant. Directly after the officer testified that he had "dealt" with defendant in "domestics," the prosecutor asked if the officer would recognize defendant if he were present. The officer proceeded to identify defendant for the record. Accordingly, the prosecution solicited the testimony for identification, which can be a proper purpose under MRE 404(b). However, that the officer knew defendant through his work in "domestics" was not relevant to the offenses for which defendant was on trial. Further, even if relevant, the probative value of such testimony was substantially outweighed by the danger of unfair prejudice. Accordingly, the officer's reference to knowing defendant through his "domestics" work was erroneously admitted.

Even though error occurred in the admission of this evidence, defendant has failed to establish that the improperly admitted evidence affected the outcome at trial. See *Carines*, 460 Mich at 763. First, the testimony averring that defendant may have been involved in some type of domestic incident in the past was isolated and vague. The prosecutor did not ask any follow-up questions about what type of "domestics" situation the officer was referencing. Further, he did not make any arguments pertaining to "domestics" during his closing and rebuttal arguments. There was also substantial evidence of defendant's guilt. Both confidential informants testified that defendant sold them multiple substances during SANE controlled buys. Subsequent testing confirmed that the substances were controlled substances. The informants' testimony was corroborated by the SANE officer who set up the controlled buys using recording devices and prerecorded money, observing the transactions using audio and visual monitoring, and collecting evidence after each of the transactions.

Further, the prejudice, if any, caused by the brief reference to "domestics" was cured by the trial court's instructions to the jury. Specifically, the court instructed as follows:

> Now you have heard evidence that was introduced to show that the defendant may have committed other crimes or improper acts for which he is not on trial. If you believe this evidence, you must be very careful to consider it for certain purposes. You may only think about whether the evidence tends to show that the police continued an investigation concerning the defendant in part, because of the evidence. You must not consider this evidence for any other purpose.
>
> For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.

"[A] limiting instruction . . . that cautions the jury not to infer that a defendant had a bad character and acted in accordance with that character can protect the defendant's right to a fair trial." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Having rejected defendant's claims concerning the officer's testimony, we also reject his

attendant claim that his trial counsel was ineffective for failing to object to the testimony. "When no *Ginther*[1] hearing has been conducted, our review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Here, defendant argues that there was no reasonable trial strategy that would justify counsel's failure to object to the testimony or request a mistrial. As for the officer's reference to "domestics," it can be a strategic decision to choose "not to object and draw attention to an improper comment." *Horn*, 279 Mich App at 40 (quotation omitted). Defense counsel could have reasonably determined that it would be better to ignore the vague and fleeting reference rather than object and draw attention to the comment. Additionally, defendant has failed to establish prejudice. As indicated, there was substantial evidence of defendant's guilt, the improper reference was vague and isolated, and the trial court gave a limiting instruction on the use of other acts evidence.

As for the evidence regarding defendant's drug history, as indicated above, it was brought up by defense counsel in his opening statement and during his cross-examination of the SANE officer. Further, defense counsel did not object to the testimony when the officer offered it during his direct examination. The testimony was consistent with the defense theory of the case, which was that the confidential informants targeted a "very large black man with a known drug and alcohol problem in a primarily white community" in order to "pass their bad luck" on to someone else and get out of a "jam" or get some money to fuel their own addictions. Defendant cannot overcome the presumption that defense counsel's chosen strategy was objectively reasonable. "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). That a strategy does not work does not render counsel's performance ineffective. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

III. PRESENTENCE INVESTIGATION REPORT

Defendant next argues that certain language contained in the PSIR was not stricken in accordance with the trial court's order. Plaintiff agrees, as do we.

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

"At the time of sentencing, either party may challenge, on the record, the accuracy or the relevancy of any information contained in the presentence investigation report." MCL 771.14(6). See also MCR 6.425(E)(1)(b). Because the Department of Corrections makes critical decisions concerning a defendant's status based on information contained in the PSIR, the PSIR should accurately reflect any determination the sentencing judge has made regarding the accuracy or relevancy of its information. See *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899. We review for an abuse of discretion the trial court's response to a claim of inaccuracies in the PSIR. *Id.* at 181.

In his brief on appeal, defendant quotes the following passage, which he represents was contained on the first page of the "Evaluation and Plan" section of the PSIR:

> The devastation drug sales have on our community is immeasurable. How many lives have been negatively affected by the defendant's actions may not be determined for many years. It's one thing if the defendant wishes to ruin his only life [sic]; it's something completely different when he ruins another's."

Defendant also represents that his counsel "objected to the commentary provided by the Probation department in the PSI[R]." The sentencing transcript reveals that defense counsel specifically discussed the first and second sentence quoted above, and the prosecutor agreed with defense counsel that "as far as the presentence report, the highlighted section under the evaluation and plan [should] be deleted." It is not discernable from review of the record what "the highlighted section" was that the parties agreed to strike; the trial court simply ruled that "[t]he record should reflect we will strike that." The current version of the PSIR contains the first and third sentences quoted above. The second sentence has since been redacted.

The prosecution agrees with defendant that "the PSIR should reflect the parties' agreement and the court's ruling[,]" and notes that the sentence, [h]ow many lives have been negatively affected by the defendant's actions may not be determined for many years" has been removed, but that the sentence, "[t]he devastation drug sales have on our community is immeasurable" remains and should be removed. At oral argument, the prosecution questioned whether that sentence was at issue in the trial court, but does not contest defendant's request to have the remaining two sentences stricken. Because both of the remaining sentences at issue in the PSIR are of the same ilk as the redacted sentence—irrelevant rhetoric by the probation department—we remand to the trial court for the ministerial task of amending the PSIR by striking both sentences identified above. The trial court should forward a copy of the amended PSIR to the Department of Corrections.

IV. JAILHOUSE INMATE IMPEACHMENT INFORMATION

In his Standard 4 brief, defendant argues that his trial counsel was ineffective for failing to investigate a jailhouse inmate's exculpatory information or call the inmate as a witness at trial. Defendant also requests a remand for an evidentiary hearing pursuant to *Ginther*, 390 Mich 436, in order to further pursue his claim of ineffective assistance of counsel based on this "newly discovered" information. In support of his argument, defendant attached to his brief on appeal a typewritten document, titled an "affidavit of fact," that was purportedly signed by a jail inmate who shared a cellblock with one of the confidential informants who testified against defendant.

In the document, the inmate claims that the informant told him that he never purchased drugs from defendant; instead, he bought them from someone else and framed defendant in order to benefit himself in a plea deal and "rip[] off" the SANE team by taking some of the drugs he purchased. The inmate asserts that he told defendant's trial counsel the information, but trial counsel never contacted him and he was not called to testify.

The failure to call a witness can constitute ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation omitted). Further, the failure to reasonably investigate the case can constitute ineffective assistance of counsel. *People v Trakhtenberg*, 493 Mich 38, 51-55; 826 NW2d 136 (2012). Concerning defendant's request for a remand, remand is proper if a factual record is required for appellate consideration of the issue. MCR 7.211(C)(1)(*ii*). The moving party must support any request for development of a factual record with an affidavit or other offer of proof. MCR 7.211(C)(1).

Initially, we note that defendant failed to file a motion to remand in accordance with MCR 7.211(A) and (C). In addition, defendant failed to support his request for remand in accordance with MCR 7.211(C)(1). Although the document attached to defendant's brief is titled "affidavit of fact," the unnotarized statement does not constitute a valid affidavit. "To be valid, an affidavit must be (1) a written or printed declaration or statement of facts, (2) voluntarily made, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation." *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011). The statement here was not sworn before an officer authorized to administer oaths, and thus carries no more weight than a regular letter. As such, defendant has failed to provide adequate support for his request, MCR 7.211(C)(1), and he fails to establish the factual predicate for his claim that trial counsel was ineffective, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Moreover, even assuming the evidence is valid and defendant is correct that his defense attorney should have investigated the matter further or called the jail inmate at trial, defendant has not established a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. See *Frazier*, 478 Mich at 243. The inmate would have challenged the credibility of only one of the informants who testified concerning a drug transaction with defendant. The other informant's testimony, that she engaged in three transactions with defendant, would be unaffected by such alleged impeachment evidence. Furthermore, all four of defendant's drug transactions were supervised by SANE using audio and visual recording devices and prerecorded money. It is not reasonably probable that the jail inmate's impeachment of one witness in the face of all the other evidence would have led to a different outcome.

Defendant also asserts that his due process rights were violated because (1) the confidential informant did not purchase drugs from defendant, (2) the informant testified falsely at trial, and (3) defense counsel knew the testimony was false and failed to take any action, which in turn violated his Sixth Amendment rights. However, defendant provides no analysis for his contention. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with

little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Accordingly, defendant has not shown error. To the extent defendant's argument is reflective of his ineffective assistance claim associated with his counsel's failure to call the jailhouse witness, it must fail for the reasons stated above. To the extent defendant's argument is an attack on the confidential informant's credibility, it must also fail. Defendant has not established a meritorious claim regarding any failure to call the jailhouse witness, and the jury was otherwise informed of the informant's potential bias, including the fact that he had been charged with a number of crimes in connection with the SANE investigation and had received the benefit of a plea deal in exchange for working as an informant.

Defendant also asserts, without any analysis, that his trial counsel's failure to bring to light the jail inmate's information and the alleged perjured testimony of the confidential informant constituted an obstruction of justice and a fraud upon the court. Once again, defendant has not shown error because he fails to explain the basis for his claim. *Id.* In context, defendant's argument is just another way of arguing that his attorney rendered ineffective assistance, which we have deemed to be without merit. With regard to the alleged perjured testimony by one of the confidential informants, defendant has failed to establish a factual predicate with respect to his purported impeachment evidence.

We affirm defendant's convictions but remand for the ministerial task of amending defendant's PSIR consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra